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No. 09-632

Supreme Court, U.S.
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In The

Supreme Court of the United States

ERLINDA DOMINGUEZ,

Petitioner,

v.

PRICE OKAMOTO HIMENO & LUM,
A Law Corporation,

Respondent.

On Petition For Writ Of Certiorari To The Intermediate Court Of Appeals Of The State Of Hawai'i

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court has jurisdiction under 28 U.S.C. section 1257(a) to review this matter where Hawai'i's Intermediate Court of Appeals ("ICA") neither ruled on nor otherwise discussed any federal questions and Petitioner presented none to that court in her assignments of error.

2. Whether the ICA correctly held that the trial court properly considered (1) foreign pleadings and a foreign judgment filed in a Japanese legal proceeding and (2) related Japanese law under Hawai'i's rules of evidence.

3. Whether the ICA correctly held that the trial court did not err in holding that the foreign pleadings and law negated a key causation element of Petitioner's claim against Respondent under Hawai'i law.

LIST OF PARTIES

The parties below were:

1. Erlinda Dominguez, dba Law Offices Of Erlinda Dominguez (Plaintiff below and now Petitioner) (hereinafter "Dominguez")

2. Price Okamoto Himeno & Lum, A Law Corporation (Defendant below and now Respondent) (hereinafter "POHL")

POHL lacks knowledge as to Dominguez's assertions that the "dba" portion of Erlinda Dominguez, dba Law Offices Of Erlinda Dominguez is now defunct and non-existent.

STATEMENT PURSUANT TO RULE 29.6

There are no parent companies to POHL's corporation or any publicly held company owning ten percent or more of POHL's stock.

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COUNTERSTATEMENT OF JURISDICTION

Dominguez attempts to invoke this Court's jurisdiction under 28 U.S.C. section 1257 on the basis of alleged violations of federal constitutional law. POHL disagrees. For reasons more fully noted in the Argument, *infra*, Dominguez did not specifically set up or claim any such violations below. Hence, jurisdiction is not properly invoked.

COUNTERSTATEMENT OF THE CASE

This petition raises purely state law issues. POHL is not aware of any conflicts with other state or federal published rulings.

1. Background

Dominguez is a Hawai'i attorney who seeks review of state law evidentiary and pleading rulings by Hawai'i's Intermediate Court of Appeals that she contends violated her Fifth and Fourteenth Amendment due process rights in litigation fallout from a malpractice judgment entered against her. She raised no constitutional arguments before the Intermediate Court of Appeals, and it decided none. The Hawai'i Supreme Court denied her request to review the intermediate appellate court ruling.

POHL is a Honolulu law firm that associated its law practice with Dominguez's following Dominguez's underlying conduct giving rise to a malpractice action

against her. Dominguez subsequently sued POHL for indemnification of the malpractice award, claiming POHL should have timely corrected her misfeasance. Hawai'i's state trial court disagreed and entered summary judgment for POHL, and that ruling was affirmed on appeal.

2. Underlying Dispute

In 1989, Dominguez filed a complaint on behalf of non-party clients in the United States District Court for the District of Hawai'i ("federal district court") against a Japanese corporation for injuries its noodle making machinery allegedly caused. (Pet'r. App. 2.)[1] The foreign corporation did not appear, resulting in entry of an order of default. Thereafter, but before entry of final judgment by the federal district court, the Japanese corporation initiated a preemptive declaratory judgment action against Dominguez's clients in a Tokyo court for the purpose of establishing its non-liability for their injuries. Dominguez was aware of the suit but took no steps to secure representation for her clients. (Pet'r. App. 2.) As a result, in January, 1992, the Tokyo court entered a default declaratory judgment absolving the Japanese company of liability. (Pet'r. App. 2, 9.) Neither Dominguez nor her clients took steps to appeal the foreign judgment, for which time to appeal expired in

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[1] "Pet'r. App." refers to Petitioner Dominguez's Appendix.

1992.[2] In August, 1993, the federal district court entered default judgment against the Japanese corporation. (Pet'r. App. 2.) The Japanese corporation had no known assets outside of Japan.

In February, 1994, two years after the Tokyo judgment was entered and long after the time to appeal it had run, Dominguez and POHL entered into a counsel association agreement, which set forth terms of a counsel relationship between them. (Pet'r. App. 2-3.)[3] The agreement was dissolved two years later in 1996. (Pet'r. App. 3.)

In 1999, Dominguez's clients filed a malpractice action against her for her handling of their personal injury suit in the federal district court and her failure to defend them in the Tokyo action. (Pet'r. App. 3.) A jury awarded judgment in the clients' favor for $483,875.09. (Pet'r. App. 3.)

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[2] *See* Japan Code of Civil Procedure, Art. 366 (1992 ed.) (Respondent POHL's Appendix ("Resp't. App.") 1); Dominguez's response to POHL's First Request for Admissions No. 27 (Record on Appeal Volume ("R. v.") 3 at 245-46).

[3] In her "Questions Presented for Review" and "Statement of the Case," Dominguez states that "[t]he parties" represented the non-party clients in federal district court. (Pet'r. App. i, 3.) This is not true. POHL did not appear in the federal district court and only entered into the counsel association agreement with Dominguez after the federal district court entered default judgment in August 1993. Nevertheless, the issue is immaterial to the matters raised in the petition because it is undisputed that the association agreement post-dated, by two years, the conclusion of the Tokyo proceeding, including the time to take an appeal.

3. Dominguez's Suit Against POHL

In 2003, Dominguez filed the underlying complaint against POHL that gives rise to the instant petition. Dominguez alleged, in part, that any errors in the handling of her clients' matter were "attributable to the negligence and conduct" of POHL. (Pet'r. App. 4.) POHL counterclaimed, in part, for breach of their counsel agreement in which Dominguez had promised but failed to carry her own professional liability insurance. (Pet'r. App. 4.)

The parties filed several motions for summary judgment. One of POHL's motions sought summary judgment on the entirety of Dominguez's First Amendment Complaint. (Pet'r. App. 5.) POHL argued that it was entitled to summary judgment because the record was undisputed that, as admitted by Dominguez, there was absolutely nothing POHL could have done as of February of 1994 to undo Dominguez's legal malpractice. (R. v.3 at 51). In particular, it was undisputed that (1) a Tokyo court had earlier absolved the Japanese corporation for any liability arising from the clients' injuries; and (2) the corporation's only known assets were in Japan. (R. v.3 at 60-64). In support of its motion, POHL relied on (1) provisions of Japan's Code of Civil Procedure ("JCCP"); (2) a decision from the United States District Court for the District of Massachusetts;[4] (3)

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[4] *See LinkCo, Inc. v. Nichimen Corp.*, 164 F. Supp. 2d 203 (D. Mass. 2001).

legal articles on Japanese law, including the JCCP; and (4) several documents filed in the Tokyo proceeding to establish that by the time POHL associated with Dominguez in 1994 (or even earlier in 1993 as Dominguez contends), it was too late to undo the 1992 Tokyo declaratory judgment absolving the Japanese corporation of liability. Because all of the corporation's known assets were in Japan, the Japanese declaratory judgment acted to effectively prohibit any execution on those assets in Japan under the federal district court's default judgment.

The trial court agreed and granted POHL's motion entering summary judgment in its favor from which Dominguez appealed to the Intermediate Court of Appeals.[5]

4. The Opinion Below

Dominguez asserted seven points of error on appeal before the Intermediate Court of Appeals. (*See* Pet'r. App. 6-7.) Only the first pertained to matters raised by the present petition. The asserted error did not raise any express federal questions, including issues of federal constitutional law. It stated:

> (1) "The Court erred in admitting arguments and evidence of [POHL] as to

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[5] Dominguez also appealed from trial court rulings granting and denying additional motions for summary judgment on POHL's counterclaims and for attorneys' fees. None of these rulings is the subject of the current petition. (*See* Pet'r. App. 4-6.)

> Japan law, orders and judgment, overruling [Dominguez's] Objections of [POHL's] failure to plead these affirmative defenses, erred in admitting Japan exhibits that were not properly authenticated and erred in taking 'judicial notice' of Japanese law, erred in the correct application of U.S. and Japan laws."

(Pet'r. App. 6. (brackets in original))

The Intermediate Court of Appeals affirmed the trial court's ruling in an unpublished summary disposition order.[6] The appellate court held that "[t]he circuit court did not err in its consideration of Japan law or its reliance on certain exhibits related to the Japan action, and did not further err in granting POHL summary judgment as to Dominguez's [First Amended Complaint]." (Pet'r. App. 8.) The appellate court explained that under Hawai'i law, POHL was not required to plead "Japan law and/or the Japan action as an affirmative defense, since those matters were used to negate the causation element of Dominguez's claims against POHL." (Pet'r. App. 8.)

The appellate court also held that the trial court "did not abuse its discretion in taking judicial notice of Japan law pursuant to Hawai'i Rules of Evidence (HRE) Rule 202 and Hawai'i Rules of Civil Procedure

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[6] The Intermediate Court of Appeals also granted in part and reversed in part the additional rulings from which Dominguez appealed. (*See* Pet'r. App. 10-18.) Again, none of these rulings is the subject of the current petition.

(HRCP) Rule 44.1." (Pet'r. App. 8.) The court held that the trial court "properly considered the Japan judgment, since that judgment was admissible pursuant to HRE Rule 902(3)." (Pet'r. App. 9.) The court further noted that under Hawai'i law, the trial court properly considered a letter from Dominguez's office to the Tokyo court acknowledging receipt of the Tokyo complaint because Dominguez did not dispute the letter's content and submitted a copy in support of her summary judgment opposition. (Pet'r. App. 9.) To the extent Dominguez disputed the authenticity of any other documents relating to the Tokyo action, the documents were not essential to the trial court's ruling and thus, even assuming they were not admissible, any error was harmless. (Pet'r. App. 9.)

Finally, the court of appeals held that Dominguez "failed to raise a material question of fact as to whether POHL caused the damages claimed by Dominguez," and in light of "the Japan judgment and its effect under Japan law, there is nothing in the record establishing that POHL could have executed the U.S. District Court judgment in Japan." (Pet'r. App. 9.)

The appellate court reviewed no federal questions, including questions of due process now advanced by Dominguez. The court stated "[a]ny other arguments raised by Dominguez that are not specifically addressed herein are without merit." (Pet'r. App. 8 n.5.)

On September 1, 2009, the Hawai'i Supreme Court rejected Dominguez's application for a writ of certiorari. (Pet'r. App. 34.)

ARGUMENT

The Hawai'i Intermediate Court of Appeals' unpublished summary disposition order is correct. It does not present any questions of federal constitutional or statutory law and does not conflict with any decisions of this Court or of federal courts of appeal or state supreme courts. It turns exclusively upon application of Hawai'i state law. Further review is therefore not warranted.

I. THE COURT LACKS JURISDICTION OVER THE PETITIONED MATTER

Dominguez has not properly invoked the Court's jurisdiction under 28 U.S.C. section 1257(a).

A. Dominguez Did Not Properly Present Any Federal Question

Dominguez never properly raised any federal question before the state appellate court. Her sole point of error on appeal to that court (Point No. 1) respecting the matters presented by this petition was devoid of any express references to federal questions.

(Pet'r. App. 6.)[7] Hawai'i Rules of Appellate Procedure, Rule 28(b)(4) requires that an opening brief contain a "concise statement of the points of error set forth in separately numbered paragraphs" and "[p]oints not presented in accordance with the section will be disregarded. . . ." *See Jou v. Dai-Tokyo Royal State Ins. Co.*, 116 Hawai'i 159, 171, 172 P.3d 471, 483 (2007) ("these arguments have not been preserved as they have not been presented as points of error" [and] "[a]ccordingly, we do not address them") (citing Haw. R. App. P. 28(b)(4)).

The challenged intermediate appellate court ruling never mentioned any question of federal law. As noted, *supra*, it stated "[a]ny other arguments raised by Dominguez that are not specifically addressed herein are without merit." (Pet'r. App. 8 n.5.) Dominguez's assertion that the "Court below *admits* that [Dominguez] presented her federal issues in the 'correct application of the U.S. and Japan laws' and enumerated assigned errors" (Pet'r. 6 (citing Pet'r. App. 6-7) (emphasis in original)) is incorrect. A review of the appellate decision, including the cited pages, shows no reference to a federal question. The mere fact that a foreign country's laws and legal proceedings were relied on to negate causation does not *ipso facto* mean a federal question is present.

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[7] Indeed, Dominguez's questions presented for review in the instant petition do not make express reference to any question of federal law.

It "is essential to the jurisdiction of the Supreme Court under [28 U.S.C. section] 1257(a) that a substantial federal question has been properly raised in the state court proceedings." Eugene Gressman et al., *Supreme Court Practice* § 3.16, at 180-81 (9th ed. 2007). This Court has made clear that where, as here, "the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had 'a fair opportunity to address the federal question. . . .'" *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) (internal citations omitted). As this Court further noted, "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Id.* at 90 (internal citation omitted). So too here, where Dominguez failed to raise a substantial federal question, much less any federal question, before the highest state court hearing her case, she has waived any opportunity to do so. The result leaves this Court without jurisdiction under 28 U.S.C. section 1257(a) to review the judgment of the Hawai'i Intermediate Court of Appeals. Her petition of writ of certiorari, accordingly, should be denied.[8]

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[8] Insofar as Dominguez might claim she made direct or indirect reference to the Fifth or Fourteenth Amendments in one of her appellate briefs, as she appears to do at page 5 of her Petition, she has not established a proper record for purposes of

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B. Dominguez's Questions Raise Only State Law Matters

Even had Dominguez made a colorable effort to raise a federal constitutional claim before the Intermediate Court of Appeals – which she clearly did not – her claims nevertheless would have turned only on state law. Her questions presented for review and their related arguments, for example, show only state, not federal, questions, as in the case of her questions asking whether the trial court (1) properly admitted certain foreign court records under Hawai'i Rules of Evidence; (2) properly took judicial notice of Japanese law under those same evidence rules; and (3) properly concluded that Hawai'i law on *res judicata* was not implicated by Dominguez's causation argument based on the foreign records and law. The appellate court considered none in the context of a federal question analysis. No matter what federal gloss Dominguez belatedly tries to put on these issues, they were first and last purely issues of state law. They present no federal questions of any kind or dimension. Jurisdiction, accordingly, under 28 U.S.C. section 1257(a) is lacking and the petition should be denied.[9]

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this Court's review. *See Live Oak Ass'n v. R.R. Comm'n State of Cal.*, 269 U.S. 354, 357-58 (1926).

[9] Dominguez's citation to 28 U.S.C. section 1741 (Pet'r. 9) which, in turn, authorizes admission of an official record of a foreign country in the manner prescribed by the Federal Rules of Civil Procedure, does not create a federal question as the

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II. THE STATE INTERMEDIATE APPELLATE COURT DID NOT ERR IN APPLYING HAWAI'I LAW

The nub of this petition is whether the Hawai'i Intermediate Court of Appeals correctly held that a default declaratory judgment entered by the Tokyo District Court against Dominguez's non-party clients could be used to deny Dominguez's claims against POHL that it negligently failed to correct her misfeasance and nonfeasance that exposed her clients to the foreign judgment. Dominguez assigns error because the ruling (1) improperly recognized, and took judicial notice of, the effect of the Tokyo judgment; (2) impermissibly applied that effect to find that Dominguez could not establish a required element of her claim (causation) against POHL; and (3) failed to recognize the foregoing as an improperly pled affirmative defense. There was no error in these

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evidentiary issues raised by Dominguez here arose in a state proceeding governed by state rules of evidence, including rules pertaining to the authentication of foreign public records. As a result, the cited federal statute was not directly implicated. *See generally Danforth v. Minnesota*, 552 U.S. 264, ___, 128 S.Ct. 1029, 1041 (2008) ("[t]he fundamental interest in federalism that allows individual States to define . . . rules or evidence, and rules of . . . civil procedure in a variety of different ways – so long as they do not violate the Federal Constitution – is not otherwise limited by any general, undefined federal interest in uniformity"). For the same reason, Dominguez's reliance on Federal Rule of Civil Procedure, Rule 902(3), and presumably its interpretative federal law (Pet'r. 9) is inapposite to the decisions of the state court below.

rulings, each of which rested on Hawai'i, not federal law.

A. The Tokyo District Court Pleadings Were Properly Admitted

Three documents from the Tokyo proceeding were relied upon by POHL in its motion for summary judgment, *viz.*, the complaint, the default declaratory judgment, and evidence that the judgment had been served on the non-party clients. The judgment and evidence of service were each certified on November 9, 2005 by the clerk of the Tokyo District Court. (R. v.3 at 266-69, 281-83.) The Japanese language version of the complaint, although not certified, had been submitted by Dominguez with an English language translation as a true and accurate copy in support of her opposition to POHL's motion for summary judgment. (R. v.4 at 145-46, 228-37, 238-40.)

The Intermediate Court of Appeals correctly held that the judgment was properly considered by the trial court under Hawai'i Rules of Evidence, Rule 902(3). (Pet'r. App. 9.) That Rule provides for self-authentication of foreign public documents purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to do so. (Resp't. App. 1-2.) Additionally, the requirement of a certification is unnecessary "[i]f reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents. . . ." (Resp't. App. 2.)

Below, Dominguez objected to the documents on grounds that POHL's counsel had no "personal knowledge" of them (R. v.4 at 149) but presented no evidence to place in question their authenticity or the accuracy of the English language translations despite ample opportunity to so investigate. This state law evidentiary ruling, aside from lacking any federal question component, was correct and is simply not a cert-worthy matter for the Court's review.

So too, there is nothing cert-worthy about the appellate court's holding that the Tokyo complaint was properly considered by the trial court given the absence of any dispute as to its contents because it had been offered by both Dominguez and POHL. (Pet'r. App. 9.) The correctness of this state law ruling speaks for itself.

B. The Trial Court Properly Took Notice Of Japanese Law

Dominguez's additional state law challenge to the appellate court's affirmance of the trial court's judicial notice of Japanese law is also unavailing and not cert-worthy. The appellate court properly held that under Hawai'i's abuse of discretion standard for discretionary evidentiary rulings, the trial court properly took judicial notice of Japanese law as it related to the impact of the Tokyo District Court's default judgment on the feasibility, if any, of POHL trying to execute on her client's federal district court default

judgment in Japan. (Pet'r. App. 8.) The appellate court relied on Hawai'i Rules of Civil Procedure, Rule 44.1 and Hawai'i Rules of Evidence, Rule 202. (Pet'r. App. 8.)

Under Hawai'i law, Hawai'i Rules of Evidence, Rule 202(c)(5) (Resp't. App. 3) authorizes a court to take optional judicial notice of "the laws of foreign countries, international law, and maritime law." *See Roxas v. Marcos*, 89 Hawai'i 91, 117 n.16, 969 P.2d 1209, 1235 n.16 (1999) ("[t]his court may take judicial notice of the law of foreign countries" under Hawai'i Rules of Evidence, Rule 202(c)(5)). Under Hawai'i Rules of Civil Procedure, Rule 44.1, a "court, in determining foreign law, may consider any relevant material or source, including testimony, *whether or not submitted by a party or admissible* under the Hawai'i Rules of Evidence." (Resp't. App. 3 (emphasis added).) These rules provide broad discretion and authority for a trial court's notice of foreign law. Dominguez has submitted no argument evincing any reasonable grounds warranting further examination of this ruling.

C. The *Res Judicata* Argument Was Properly Rejected

Dominguez's challenge to the appellate court's holding that POHL did not have to affirmatively plead *res judicata* also lacks any justification for this Court's review. The challenge reflects Dominguez's

confusion over the purpose for which POHL relied on the uncontested Japanese declaratory judgment.

The essence of POHL's causation argument was that, by the time it had entered its counsel agreement with Dominguez, there was nothing it could have done to correct Dominguez's negligent failure to defend against the Tokyo action because (1) the Tokyo default judgment had become final and non-appealable; (2) all of the Japanese corporation's known assets were in Japan; and (3) the Tokyo default judgment would have made it impossible to execute the federal district court default judgment on the foreign corporation's assets in Japan.

As the court of appeals correctly determined, POHL was not required to plead Japanese law or the Japanese action as an affirmative defense since "those matters were used to negate the causation element of Dominguez's claims against POHL." (Pet'r. App. 8.) The holding was based on the Hawai'i Supreme Court's ruling in *Bhakta v. County of Maui*, 109 Hawai'i 198, 212, 124 P.3d 943, 957 (2005) ("[a] defense is not affirmative where it 'merely negates an element of the plaintiff's prima facie case'") (citation omitted). Contrary to Dominguez's several arguments on this issue, no federal question of any kind was implicated by the appellate court's clear-cut state law

ruling. It does not warrant further review by the Court.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[10] Dominguez's argument, for example, that allegedly improper service of the Tokyo complaint and default declaratory judgment on her former clients somehow violated *her* constitutional right (Pet'r. 12) is a non-starter. Even assuming service did not meet federal constitutional due process guarantees, it is immaterial because the causation question below was whether a Japanese court would have allowed Dominguez's clients to enforce their federal district court judgment in Japan. Disposition of that question would have turned exclusively on Japanese law as adjudicated by Japanese courts. Due process considerations required by our federal constitution would have played no role in assessing the foreign sovereign's likely adjudication of this purely Japanese matter.

Respondent's Appendix

JAPAN CODE OF CIVIL PROCEDURE

Article 366. Period for filing koso-appeal

Koso-appeal shall be filed within two weeks from the day of service of the judgment. Provided, That the validity of Koso-appeal filed prior to the foregoing period shall not be lost.

2. The period as mentioned in the preceding paragraph shall be peremptory.

(R. v. 3 at 71, 76 (¶ 20), 248, 249 (¶ 10), 271).

Haw. R. Evid. 902(3). Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating

to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

Haw. R. Evid. 202. Judicial notice of law.

(a) Scope of rule. This rule governs only judicial notice of law.

(b) Mandatory judicial notice of law. The court shall take judicial notice of (1) the common law, (2) the constitutions and statutes of the United States and of every state, territory, and other jurisdiction of the United States, (3) all rules adopted by the U.S. Supreme Court or by the Hawaii Supreme Court, and (4) all duly enacted ordinances of cities or counties of this State.

(c) Optional judicial notice of law. Upon reasonable notice to adverse parties, a party may request that the court take, and the court may take, judicial notice of (1) all duly adopted federal and state rules of court, (2) all duly published regulations of federal and state

agencies, (3) all duly enacted ordinances of municipalities or other governmental subdivisions of other states, (4) any matter of law which would fall within the scope of this subsection or subsection (b) of this rule but for the fact that it has been replaced, superseded, or otherwise rendered no longer in force, and (5) the laws of foreign countries, international law, and maritime law.

(d) Determination by court. All determinations of law made pursuant to this rule shall be made by the court and not by the jury, and the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under these rules.

Haw. R. Civ. P. 44.1. Determination of foreign law.

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Hawai'i Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.